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No. 97 1883 MAY 2 1 1998

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In The

Supreme Court of the United States

October Term, 1997

CHARLES X. DANIELS and JINO S. ST. LOT,

Petitioners,

vs.

SIX-L'S PACKING CO. and LAWRENCE LIPMAN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a civil rights litigant deprived of his constitutional right to a fair trial where the trial judge displays open hostility toward his counsel in the presence of the jury and betrays the appearance of impartiality?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Farm-Op, Inc., a defendant below, is no longer a party to the proceeding.

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Petitioners Charles X. Daniels and Jino S. St. Lot ("Daniels and St. Lot") respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit ("Court of Appeals") in this case.

OPINIONS BELOW

The Court of Appeals' decision, which was rendered without an opinion on December 16, 1997, is reported at *Daniels et al. v. Six-L's et al.*, 132 F.3d 1460 (11th Cir. 1997). (App. A). The unofficial report is located at 1997 U.S. App. LEXIS 38190.

The Court of Appeals' denial of the suggestion for rehearing *en banc*, which was rendered without an opinion on February 20, 1998, is reported at *Daniels et al. v. Six-L's et al.*, 137 F.3d 1357 (11th Cir. 1998). (App. C). The unofficial report is located at 1998 U.S. App. LEXIS 7612.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on December 16, 1997. The Court of Appeals denied a timely suggestion for rehearing *en banc* on February 20, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Due Process Clause

STATEMENT OF THE CASE

The fundamental question in this case is whether Daniels and St. Lot, Title VII litigants, are entitled to a new trial where the trial judge displayed open hostility toward their counsel in the presence of the jury and betrayed the appearance of impartiality, depriving them of a fair trial.

The original jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1331.

Daniels and St. Lot sought redress for race-based employment discrimination pursuant to Title VII, 42 U.S.C. § 2000e *et seq.*, as amended, and 42 U.S.C. § 1981, and for common law negligent supervision.

Respondent Six-L's Packing Co. ("Six-L's") moved for summary judgment on April 26, 1996 and, upon further discovery proceedings, amended its motion for summary judgment on September 9, 1996. At oral argument on Six-L's summary judgment motion on November 29, 1996, the district court examined the sufficiency of every aspect of this case in comprehensive detail. The district court then denied Six-L's motion for summary judgment on December 20, 1996, and set the case for jury trial.

The jury trial took place on January 13, 21-29, 1997. The facts adduced at trial were as follows:

Daniels and St. Lot, black males, were long-time employees of Six-L's. Six-L's is a family-owned company that sells and markets produce.

On January 13, 1994, Daniels was terminated by Jack Poklemba, the recently hired packing house supervisor, who

handed him a letter of termination. Poklemba informed Daniels that he was being terminated for sexually harassing Griselda Jaques, a female co-worker, and for failing to apologize to her.

Although the stated reason for Daniels' termination was his failure to apologize to Jaques, Joseph Taylor, Six-L's human resources manager, admitted he was personally aware that Daniels had apologized to Jaques on two occasions and, indeed, that he was present when Daniels apologized to Jaques the second time. Daniels denied harassing Jaques. Jaques never made a claim of sexual harassment against Six-L's.

As the personnel manager for Six-L's, Taylor investigated at least ten incidents of sexual harassment involving non-black employees, none of whom was disciplined or terminated by Six-L's.

Approximately one month before Daniels was terminated and before the alleged incident involving Jaques, Poklemba had said to James Wheeler, a white Six-L's employee, "Bear with me and give me a few weeks and I'll eliminate Charlie."

On the morning of Daniels' termination, just before Poklemba delivered the termination letter, he stopped by St. Lot's office and stated, "I got Charlie now. I got that nigger now."

St. Lot had been employed with Six-L's since age 18 and had worked there 12 years when he was terminated from his supervisory position on March 25, 1994 after a heated argument with Gary Crossno, the company mechanic.

St. Lot was terminated by Poklemba and Taylor, who simultaneously handed him a letter of warning and a termination letter. Initially, St. Lot was informed that he was being fired for

arguing with Crossno. Later, he was told he was terminated for refusing to work with Crossno after their confrontation. St. Lot denied ever refusing to work with Crossno.

After terminating St. Lot, Poklemba informed him that he had five minutes to leave the premises. When St. Lot asked what he meant, Poklemba stated, "You heard me, nigger, I give you five minutes to get out of the plant." After St. Lot was fired, Poklemba also told him, "I told you, nigger, I was going to get you."

On numerous occasions, Poklemba was heard uttering racial slurs and remarks. For example, during a confrontation with Daniels, Poklemba stated, "You niggers get in a position, you want to run things" and, referring to whites running the company, "We run things around here." Daniels and St. Lot testified that Poklemba regularly referred to the black workers at Six-L's as "niggers" and "monkeys."

Taylor, the personnel manager, testified that other Six-L's employees had complained to him that Poklemba used racial slurs like "monkeys" and remarks like "they stink" when referring to blacks and Haitians, and that he had reported the complaints to management but knew of nothing that was done to curb Poklemba's racial tirades. On other occasions, Poklemba remarked that the company "had too many niggers working for them and he would like to get rid of a few" and "I should fire all of you niggers." During a strike by Haitian plant workers the day before Daniels was terminated, Poklemba was heard to say, "Them niggers don't know what they got."

During the trial, The Hon. Thomas Wiseman, a retired visiting judge from Nashville, Tennessee, who was assigned the case on the eve of trial, directed pervasive and inflammatory comments at Nicolas A. Manzini, counsel for Daniels and St. Lot, in the presence of the jury.

On more than 80 occasions, Judge Wiseman berated and criticized or admonished Manzini in front of the jury, starting during jury selection and opening statements and continuing through closing arguments. On at least two occasions, Judge Wiseman openly threatened to declare a mistrial or dismiss the case as a sanction against Daniels and St. Lot. On 29 of those 80 occasions, Judge Wiseman's successive interruptions and criticisms were leveled without any pending objection from opposing counsel. The majority of the slights were leveled at Manzini during his presentation of Daniels and St. Lot's case-in-chief. Judge Wiseman's bellicose demeanor and tone and his relentless comments to and about Manzini conveyed to the jury his disapproval of Daniels and St. Lot's case.

Judge Wiseman interrupted Manzini on 27 separate occasions during his examination of Daniels alone, beginning with the following comment at page 88 of volume 1 of the trial transcript, without being prompted by any objection from the other side:

> Now, wait, Mr. Manzini. You know that is incompetent. Listen, don't you do that again, Mr. Manzini. When you know something is an incompetent question, don't you ask it in this Court. I don't know what your usual practice is down here, but it doesn't work here.

At page 89 of volume 1, Judge Wiseman again interrupted Manzini's examination of Daniels:

> Now, Mr. Manzini — ladies and gentlemen, step out of the room just a minute please. It's all right, just step out of the room. Go ahead . . .

Outside the presence of the jury, Judge Wiseman threatened:

> Mr. Manzini, I've cautioned you about this once. This is caution number two. If you do this again, I'm going to declare a mistrial. Do you understand that?"

When the jury returned to the courtroom, Manzini continued with his examination of Daniels, only to be interrupted by Judge Wiseman again.

At page 93 of volume 1:

> Just ask him if he recognizes it. Ask him what it is.

At page 98:

> Mr. Manzini, it's not necessary for you to repeat the testimony. Just ask another question. That evidence is in.

At page 99:

> That's not the proper use of the deposition, Mr. Manzini . . . Let's get on with it.

At page 110:

> Sustained. Ladies and gentlemen, disregard that, please. That's not personal knowledge either. Go ahead.

At page 117:

> No, sir, she's not a company agent. You haven't demonstrated she's in any position of management

or control, so you're trying to get it in under 801(d)(2), and that doesn't work, Mr. Manzini. Objection is sustained.

At page 123:

Yes, sir. Lay the foundation, if he knows. Lay some foundation of personal knowledge about that, Mr. Manzini.

At page 127:

No, no, no sustained.

At page 128:

Sustained, sustained. Don't tell us what Roger Bennett said now. Go ahead, ask another question, Mr. Manzini.

At page 129:

We're going to give him a little latitude. Now, go right ahead Mr. Manzini, and don't lead him, please, just let him testify.

At page 143:

We're not here about guesses, Mr. Manzini.

During Manzini's re-direct examination of Daniels, at volume 2, page 71:

Your comments are arguments.

At page 74:

> No, no, no, no . . . Now you're clearly leading him.

At page 82:

> Mr. Manzini, you can ask questions without being quite so leading . . . Well, you let the witness testify. You're not testifying. You're not under oath.

At page 84:

> Mr. Manzini, that is an improper question and you know that is an improper question. Now, you may ask him why he filed the lawsuit.

At page 85:

> Any further questions?

At page 87:

> Now, wait a minute. When I sustain an objection, Mr. Daniels, you don't answer the question. Ask another question, Mr. Manzini . . . Ask a proper question, Mr. Manzini.

Finally, at page 89, during Manzini's re-direct examination of Daniels, and *in the jury's presence*, Judge Wiseman threatened:

> Sustained. Mr. Manzini, if you don't quit leading this witness, I'm going to carry through on what I promised you earlier.

Shortly afterward, Judge Wiseman berated Manzini yet again, this time openly threatening a mistrial in front of the jury. In doing so, he let the jury know that this was not the first time he had threatened to declare a mistrial and end Daniels and St. Lot's case. At page 91:

> Now, Mr. Manzini, in case you don't know, a leading question is a question that suggests the answer to the witness . . . And you're repeatedly violating the rule of law and rule of evidence and you ought to know better. *And I had cautioned you about it a number of times and if you don't stop, I'm going to declare a mistrial . . . It better come first nature for you not to do it, Mr. Manzini, because it's not going to happen in this Court. I don't know where you practice, it's not going to happen here. Now, I've cautioned you out of the presence of the jury. I'm doing it in the presence of the jury now because I want you to stop.*

(Emphasis added.)

Judge Wiseman continued at page 93:

> Now, ladies and gentlemen, disregard that. *Mr. Manzini is not under oath. Mr. Manzini is not testifying. And what he's doing now, he's trying to testify, and that is improper under the rules of this Court and under the Federal Rules of Evidence . . .* Now, you may ask again, Mr. Manzini, and you try to properly phrase it.

(Emphasis added.)

At page 95:

> Mr. Manzini, who do you think you worked for is the way to ask that question. And the previous question, did you think your checks — who did your checks come from, who did your checks come from. Mr. Manzini, have you finished with this witness?

Judge Wiseman's interruptions and criticisms of Manzini continued throughout the remainder of Daniels and St. Lot's presentation of their case. Indeed, during Manzini's examination of prosecution witness Willie Callins, Judge Wiseman threatened yet again in the presence of the jury:

At volume 3, page 208:

> No, sir. I've ruled on this now, Mr. Manzini, and you may ask another question, but you may not ask this question again and you may not be heard further on it. Now, go ahead . . . Sustained, Mr. Manzini. That is asking the same question in a different language. *If you don't start abiding by the rules of evidence and abide by this Court's rulings, Mr. Manzini, I'm going to take sanctions against you . . . up to and including dismissal of your client's case. You're exceeding the bounds, Mr. Manzini, and I'm not going to put up with it much longer.*

(Emphasis added.)

Even during Manzini's cross-examination of defendant Lawrence Lipman (when great latitude is usually afforded counsel), Judge Wiseman's criticisms and interruptions continued, with Judge Wiseman assuming an adversarial role.

At volume 4, page 145:

> It is sustained. Let the jury make those comparisons, Mr. Manzini.

At page 156, with no objection pending:

> Now, everybody stop. Mr. Manzini, you phrase your questions in such a way that a yes or no answer is called for.

At page 159:

> Yes. Sustained. Ladies and gentlemen, I'll tell you what the trial is about at the appropriate time.

At page 160, with no objection pending:

> Now, wait just a minute. Wait just a minute. Number one, don't argue with the witness. Number two, don't ask another question until he's finished with his answer, please, Mr. Manzini. Ask another.

At page 161, with no objection pending:

> Now, Mr. Manzini, let him finish his answer . . .

At page 161, when Manzini suggested that Lipman had not fully answered a question:

> Yes, sir, he certainly has. We've been over this several times now, Mr. Manzini. Please move on to something else.

At page 170:

> Yes, sir. Mr. Manzini, save your argument for the appropriate time, please.

At page 175:

> That's not a question. Ask a question, Mr. Manzini.

At page 176, with no objection pending, Judge Wiseman volunteered:

> *Ladies and gentlemen, I want to remind you of something. A statement made in the course of a question is not proof of the truth of that fact. It is not — unless it's agreed to by the witness, it is proof of nothing . . . Now, I don't know whether there's been any testimony in this case. It's up to you to decide whether there's been any testimony in this case that the truck sat outside Gary Crossno's office for two days with the keys in it . . . I don't remember that testimony, but Mr. Manzini has just asked a question as if that were the testimony. And I don't recall hearing it.* That's up to you to decide what has been testified to and what has not . . . Continue, Mr. Manzini.

(Emphasis added.)

At page 181, with no objection pending, Judge Wiseman again volunteered:

> *Ladies and gentlemen, we're not here to try what is fair. We're not here to try whether or not we might have done something differently. We're here to try*

> *whether or not Mr. Jino St. Lot was fired because of racial considerations . . . You and I might have done something different in this case. You and I might not think it's fair. But that is not what we're here about.* We're here only to determine whether or not he was fired because of his race . . . Now, confine yourself, Mr. Manzini, to questions that are relevant.

(Emphasis added.)

At page 187 with no objection pending:

> Mr. Manzini, we've been over that, over that and over that. Now, go ahead, please, conclude your examination.

At page 189:

> Mr. Manzini, move on, please. You've — you're wearing us out now. Go on.

Even when he was inclined to agree with Manzini and overrule an objection from the other side, Judge Wiseman had something derisive to say. For example, during Manzini's closing argument, counsel for Six-L's objected to his characterization of the evidence and the credibility of a witness. Judge Wiseman stated, at volume 6, page 233:

> Well, that's — he's suggesting to the jury that this is what they should — the way they should judge the testimony . . . Remember, ladies and gentlemen, the lawyer's opinion, the lawyer's personal opinion is just not relevant to the case at all . . . *So, don't do that again, Mr. Manzini.*

(Emphasis added.)

On January 29, 1997, after a seven-day trial, the jury returned a verdict against Daniels and St. Lot and in favor of Six-L's.

On February 10, 1997, Daniels and St. Lot filed their notice of appeal to the United States Court of Appeals for the Eleventh Circuit. Oral argument was held on December 11, 1997, before a three-member panel of the Court of Appeals consisting of The Hon. Dubina, Circuit Judge, and the Hons. Fay and Keith[1], Senior Circuit Judges.

At the outset of oral argument, Judge Fay asked Daniels and St. Lot's appellate counsel to identify any erroneous rulings made by the trial judge in conjunction with his admonitions and comments to trial counsel (Manzini) and suggested that the trial judge's conduct was justified. Judge Fay referred to Manzini's incompetence in framing questions that were not leading in nature or that did not elicit hearsay testimony.

Judge Dubina asked Daniels and St. Lot's counsel what she would have done if she were the trial judge, and whether a curative instruction regarding the Judge Wiseman's comments and admonitions during the trial was given to the jury.

Lastly, Judge Keith asked Daniels and St. Lot's counsel to articulate the standard of review (plain error) and whether Manzini had sought a mistrial.

On December 16, 1997, the three-member panel affirmed the judgment below without an opinion.

Thereafter, on February 20, 1998, the Court of Appeals denied Daniels and St. Lot's timely suggestion for rehearing *en banc*.

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1. Honorable Damon J. Keith, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS' ENDORSEMENT OF THE TRIAL JUDGE'S CONDUCT AND HIS DEPARTURE FROM THE APPEARANCE OF STRICT IMPARTIALITY THREATENS THE FOUNDATION OF OUR JUDICIAL SYSTEM AND INVOKES THIS COURT'S SUPERVISORY POWERS.

In affirming the judgment and denying a new trial, the Court of Appeals disregarded the overpowering influence of the trial judge's every word upon the jury and condoned the trial judge's departure from the appearance of strict impartiality that is the cornerstone of our judicial system. Aside from furthering the encroachment upon Daniels and St. Lot's right to a fair trial, the Court of Appeals telegraphed its growing distaste for employment discrimination cases and removed the welcome mat that once greeted civil rights litigants like Daniels and St. Lot.

It is beyond dispute that

> a fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.

In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955). To perform its function, "justice must satisfy the appearance of justice." *Murchison*, 439 U.S. at 136 (quoting *Offutt v. United States*, 348 U.S. 11, 14, 75 S. Ct. 11, 13, 99 L. Ed. 11 (1955).

In *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S. Ct. 1610, 1613, 64 L. Ed. 2d 182 (1980), this Court recognized that the "requirement of neutrality in adjudicative proceedings" serves dual interests of equal importance, as

> it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him. (Citations omitted).

Hence,

> [T]he neutrality requirement not only guarantees that each litigant receives a fair trial as determined by those learned in the law, but also engenders the faith in the integrity of this country's tribunals that is so unquestionably vital to this government's existence.

Anderson v. Sheppard, 856 F.2d 741, 746 (6th Cir. 1988). It is not enough that the judge, despite his predetermination of essential facts, may put them aside and conduct a fair trial but that there also shall be such an atmosphere about the proceeding that the public will have the "assurance" of fairness and impartiality. *Connelly v. U.S. Dist. Court*, 191 F.2d 692, 697 (9th Cir. 1951).

Similarly, a civil rights litigant should feel confident that his discrimination claim will be well-received and disposed of fairly and will not be rebuked or derailed by an unreceptive and unfriendly judiciary. The trial judge's caustic conduct toward Daniels and St. Lot's counsel and the Court of Appeals' approval of the trial judge's conduct is indicative of the impatience displayed by some federal courts toward employment

discrimination claimants in recent years, and of the evolving status of discrimination law. Indeed, a large number of employment discrimination cases are now routinely felled at the summary judgment stage. The Hon. Nancy Gertner, *Changing Times: Summary Judgment and Employment Law*, 1996 Annual Convention Manual of the National Employment Lawyers Association.

In a troubling comparison that embodies the federal courts' deteriorating perceptions of employment cases, a federal judge recently described employment discrimination law as the "family law of the 1990's." *Gertner, supra.* In explaining some federal courts' changing attitudes toward employment discrimination cases and the increasingly liberal granting of defendants' motions for summary judgment, Judge Gertner points to the flood of employment cases in federal courts and the lack of resources to meet the increased demand:

> This flood of cases in federal courts has resulted, in part, in a cramping of the courts' historically generous hold of employment discrimination cases; it has also led, in some measure, to the current focus on employment discrimination cases as primarily about "disgruntled employees," dispute resolution and not great principles, and to an unwillingness to stretch increasingly rigid threshold requirements before allowing a case to be heard in federal court.

Judge Gertner also points to the evolving nature of the claims, which are no longer as dramatic or the discrimination as blatant as when Congress first enacted the Title VII laws. In response to employers' increased adeptness at carrying out and covering up discrimination in the workplace, some federal courts have raised the bar on claimants' evidentiary burdens, causing a chilling effect on these claims.

Here, Daniels and St. Lot's claims of race discrimination beat the odds by surviving a rigorous summary judgment

examination that lasted eight months, only to have the responsibility for the trial of their case turned over to a retired visiting judge who was not even aware that a defense motion for summary judgment had been denied in all respects.

As the nature of employment cases has evolved, so have the courts' attitudes. *Gertner, supra.*

> Perhaps, in order to prevent the courts' impatience with the litigation of employment discrimination cases, plaintiffs' attorneys would do well to monitor the kinds of cases brought in federal court and to remind the courts, when they can, of the historic and continuing role that individual employment discrimination cases play in our society's larger goals of social justice and workplace equality.

Gertner, supra.

From the outset of the trial, the trial judge made clear to the jury his displeasure with Daniels and St. Lot's case and he used Daniels and St. Lot's counsel (Manzini) as his punching bag. Beginning with jury selection and on more than 27 occasions during Manzini's presentation of Daniels and St. Lot's case-in-chief, the trial judge displayed open hostility towards Manzini, interrupting his presentation of Daniels and St. Lot's case-in-chief, even when there was no pending objection from Six-L's counsel. The trial judge openly threatened Manzini with mistrial on two separate occasions in the jury's presence, again without prompting from opposing counsel. Each and every time the jury heard the trial judge utter Manzini's name in the courtroom, it was certainly followed by, and subsequently associated with, disapproval.

Through his incessant interruptions of Manzini's examination of witnesses, his repeated criticisms of Manzini

and threats of mistrial, and his obvious impatience with and lack of any deference or respect for Daniels and St. Lot's case, the trial judge conveyed to the jury, wittingly or not, the appearance of partisanship that translated into denial of a fair trial. Through its affirmance and denial of a new trial, the Court of Appeals sanctioned the trial judge's departure from the requisite "appearance of impartiality" and the resulting derailment of Daniels and St. Lot's employment discrimination claims.

II.

THE COURT OF APPEALS' DENIAL OF A NEW TRIAL CONFLICTS WITH PRECEDENT IN OTHER CIRCUITS REQUIRING A NEW TRIAL WHERE THE TRIAL JUDGE'S CONDUCT IN THE PRESENCE OF THE JURY BETRAYED THE APPEARANCE OF IMPARTIALITY.

The Court of Appeals' decision conflicts with decisions in other circuits requiring a new trial where the trial judge's criticism of and hostility toward trial counsel departed from the appearance of impartiality and deprived the litigants of a fair trial.

The Court of Appeals determined that the trial judge's conduct and comments directed at Daniels and St. Lot's counsel (Manzini) were justified by counsel's own conduct, were technically correct and, therefore, did not warrant a new trial. Although the grounds for the *per curiam* affirmance were not set forth in the Court of Appeals' decision, it is evident from the panel's questions at oral argument and the denial of the suggestion for rehearing *en banc* that the Court of Appeals determined that a new trial was not warranted because the trial judge's interjections and his evidentiary rulings were technically sound. However, the Court of Appeals' judgment conflicts with

precedent in the Second and Fifth Circuits requiring a new trial where the trial judge's numerous comments and criticisms of trial counsel, even if warranted, operated to betray the appearance of strict impartiality that is essential to a fair trial.

Apparently adhering to its own precedent in *Coats & Clark, Inc v. Gay*, 755 F. 2d 1506 (11th Cir. 1985), the Court of Appeals here disregarded the compound and prejudicial effect of the trial judge's comments and criticisms of Daniels and St. Lot's counsel merely because some of his rulings were substantively sound and some of his interruptions appeared justified. Likewise, in *Coats & Clark*, the Court of Appeals determined that a new trial was not warranted where the trial judge's impatience, sarcasm and intemperate remarks toward defendant and his counsel appeared justified. *Id.* at 1512.

However, the Court of Appeals' affirmance directly conflicts with cases in other circuits holding that a trial judge's numerous interjections and hostile conduct toward trial counsel breaches the appearance of strict impartiality and robs the litigant of a fair trial. Even where judicial intervention at trial was justified and the trial judge's admonitions were merited, other circuits have ordered a new trial where the trial judge's remarks toward trial counsel tended to give the jury the impression that his client's case was "of little substance and not worthy of much attention." *United States v. Coke*, 339 F.2d 183 (2d Cir. 1964) ("While to some extent the admonitions were merited . . . the comments of the trial judge were of such a nature that, in the context in which they were made, they must have improperly prejudiced the defense in the minds of the jurors"); *Bursten v. United States*, 395 F.2d 976 (5th Cir. 1968) ("Even if there is some basis for some criticism of overpartisanship, of defense counsel, this does not justify unwonted and unnecessary continuous interruptions. A trial judge must strive for total neutrality and complete circumspection, in the eyes and minds

of the jury"); *A.C. Newman v. A.E. Staley Manufacturing Co.*, 648 F. 2d 330 (5th Cir. 1981); *United States v. Candelaria-Gonzalez*, 547 F.2d 291 (5th Cir. 1977) ("Even if the judge's disapproval was occasionally warranted by defense counsel's conduct, we find slight, if any, justification in the record for the judge's sarcasm, his frequent interruptions and his antagonistic comments in the jury's presence.")

Moreover, in carrying out his role to ensure the proper presentation of evidence, often times a trial judge must make remarks from the bench within earshot of the jury. *Bursten v. United States*, 395 F.2d 976 (5th Cir. 1968); *United States v. Lanham*, 416 F.2d 1140 (5th Cir. 1969); *Travelers Ins. Co. v. Ryan*, 416 F.2d 362 (5th Cir. 1969); *United States v. Cisneros*, 491 F.2d 1068 (5th Cir. 1974); *United States v. Candelaria-Gonzalez*, 547 F.2d 291 (5th Cir. 1977); *A.C. Newman v. A.E. Staley Manuf. Co.*, 648 F.2d 330 (5th Cir. Unit B 1981). Where mild admonitions to counsel do not suffice, any sterner or more forceful directions which may be warranted should be given outside the presence of the jury. *United States v. Coke*, 339 F.3d 183 (2d Cir. 1964).

Moreover, even where

> remarks by the district judge within the hearing of the jury are often necessary, the judge should take care not to give the impression that he or she prefers one litigant over another.

Newman, *supra*, 648 F.2d at 334. Thus, the primary consideration is not whether the trial judge's numerous remarks and rulings were warranted, but whether their delivery tended to prejudice the jury against Daniels and St. Lot and, therefore, deprived them of a fair trial.

The trial judge departed from the appearance of neutrality when he demeaned Manzini's abilities as trial counsel and his credibility, and when he interjected his own *sua sponte* objections to even mildly leading questions by Manzini that were designed to streamline the testimony of inexperienced or hostile witnesses.

The trial judge's overreaction to Manzini's style of examination demonstrated to the jury the trial judge's impatience not only with Manzini, but with Daniels and St. Lot's case. For example, when Manzini asked Daniels on re-direct examination about his two previous attorneys and why they no longer represented him in the case (a subject that Six-L's counsel had covered extensively on cross-examination), the trial judge, without a pending objection from Six-L's, stopped Manzini and threatened a mistrial in the presence of the jury:

> THE COURT: Now, Mr. Manzini, in case you don't know, a leading question is a question that suggests the answer to the witness.
>
> MR. MANZINI: I apologize.
>
> THE COURT: And you're repeatedly violating the rule of law and rule of evidence and you ought to know better. And I had cautioned you about it a number of times and if you don't stop I'm going to declare a mistrial.
>
> MR. MANZINI: I apologize. It's second nature and I apologize.
>
> THE COURT: It better become first nature for you not to do it, Mr. Manzini, because it's not going to happen in this Court. I don't know where you

> practice, it's not going to happen here. Now, I've cautioned you out of the presence of the jury. I'm doing it in the presence of the jury know because I want you to stop.

The trial judge seized every opportunity to chastise and argue with Manzini during the presentation of Daniels and St. Lot's case. The trial judge went so far as to tell the jury (erroneously) that this case had nothing to do with "fairness." Fairness is, indeed, an aspect of an employment discrimination case, especially where a litigant relies on evidence of disparate treatment to establish his *prima facie* case (as did Daniels and St. Lot). Disparate treatment centers on fair and even application of workplace rules.

Coupled with his numerous threats in front of the jury to dismiss or mistry Daniels and St. Lot's case, the trial judge's quickness to chide Manzini at every turn and his non-stop belligerent comments left the jury with the indelible impression that the trial judge did not think Daniels and St. Lot had much of a case.

In determining whether the trial judge's conduct deprived Daniels and St. Lot of a fair trial, it was not necessary to demonstrate actual bias by the trial judge, but whether his conduct breached the "appearance of strict impartiality." *A.C. Newman v. A.E. Staley Manufacturing Co.*, 648 F.2d 330 (5th Cir. 1981). Daniels and St. Lot respectfully submit that the trial judge's hostility toward their counsel (Manzini) infused the trial proceeding, prejudiced the jury against Daniels and St. Lot, and requires a new trial. The Court of Appeals' refusal to award a new trial cuts against settled law in other circuits and invokes this Court's jurisdiction.

CONCLUSION

This case presents a question of significant importance — whether litigants are entitled to a new trial where the trial judge prejudiced the jury with his hostility toward their counsel and his open and utter disrespect for their civil rights case. By granting Daniels and St. Lot's petition for certiorari this Court can correct the Eleventh Circuit's departure from those cases requiring a new trial where the trial judge's criticisms of counsel and incessant interruptions, even if warranted, likely prejudiced the jury and deprived the litigants of a fair trial. By granting certiorari, this Court can also correct what is emerging as a troubling trend among some federal courts whose disfavor of discrimination claims is having a palpable and chilling effect on employment discrimination cases. In so doing, this Court can reaffirm the critical and momentous role played by the trial judge in our judicial system and in the civil rights forum.

Accordingly, Daniels and St. Lot respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED DECEMBER 16, 1997

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-2176

D. C. Docket No. 95-764-CIV-T-24B

CHARLES X. DANIELS, JINO S. ST. LOT,

Plaintiffs-Appellants,

versus

SIX L'S PACKING, INC., a Florida Corporation, FARM-OP, INC., a Florida Corporation, LAWRENCE LIPMAN, individually,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

(December 16, 1997)

Before DUBINA, Circuit Judge, FAY and KEITH*, Senior Circuit Judges.

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* Honorable Damon J. Keith, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

Appendix A

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.[1]

"Costs taxed against plaintiffs-appellants."

Judgment Entered: December 16, 1997
For the Court: Thomas K. Kahn, Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 3/3/98

REISSUED AS MANDATE: 3/12/98

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1. 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) the judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) a summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) the judgment has been entered without a reversible error of law;

and an opinion would have no precedential value, the judgment or orderly be affirmed or enforced without opinion.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION FILED JANUARY 30, 1997

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NUMBER: 95-764-Civ-T-24B

CHARLES X. DANIELS and JINO S. ST. LOT,

VS.

SIX L'S PACKING COMPANY, INC., a Florida corporation, and FARM-OP, INC., a Florida corporation

JUDGMENT IN A CIVIL CASE

☒ **Jury Verdict.** This action came before the court for trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment be entered in favor of the defendant's SIX L'S PACKING COMPANY, FARM-OP, INC., and LAWRENCE LIPMAN, and against the plaintiff's CHARLES X. DANIELS and JINO S. ST. LOT.

January 30, 1997 **RICHARD D. SLETTEN,CLERK**

(By) s/ Kathy Thomas
Deputy Clerk

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED FEBRUARY 20, 1998

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 97-2176

CHARLES X. DANIELS, JINO S. ST. LOT,

Plaintiffs-Appellants,

versus

SIX L'S PACKING, INC., a Florida Corporation, FARM-OP, INC., a Florida Corporation, LAWRENCE LIPMAN, individually,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion , 11th Cir., 19__, __F.2d __).

Before: DUBINA, Circuit Judge, FAY and KEITH*, Senior Circuit Judges.

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* Honorable Damon J. Keith, Senior, U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

Appendix C

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en bane (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE